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NLRB Requires Employer to turn over Witness Statement

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Under *Anheuser Busch* (237 NLRB 982, (1978)), employers were not required to turn over witness statements to the Union where such statements were obtained during the course of an employer's disciplinary investigation because such statements were confidential. Recently, however, the NLRB found that a witness statement was not entitled to such protections, nor did it constitute attorney work product, and required the employer to produce the disputed statement.

This case arose out of the following series of events: A union steward attempted to attend a meeting between a union member and a newspaper editor concerning whether the union employee had violated the newspaper's security access policy by admitting a union representative into the facility. The editor and union steward argued about the steward's right to attend the meeting, and ultimately the steward did not attend.

The following day, the employee was asked to attend a meeting with two other management representatives to discuss what occurred in the confrontation between the steward and the editor. The employee recounted what happened and one of managers prepared a short written account of the incident and asked the employee to sign it. The employee made some minor corrections to the document and signed it. At some undetermined time later, the manager wrote on the memo "Prepared at the advice of counsel in preparation for arbitration."

A few weeks later the union steward was suspended and discharged. The union filed a grievance over the discharge and sought a copy of the memo signed by the employee. The newspaper objected to producing a copy of the memo, arguing that the general duty to furnish information concerning the employer's investigation does not include the duty to furnish "witness statements" themselves.

Ultimately, in a surprising move, the National Labor Relations Board (NLRB) affirmed the judge's order that the signed statement be produced. The NLRB found that there was no evidence that the witness (1) had adopted the statement or, alternatively, (2) was given assurances of confidentiality before providing the "statement."

The NLRB also rejected the employer's contention that the memo could be withheld based on the attorney work-product privilege because that privilege does not apply to documents created in routine investigations conducted in the ordinary course of business.

Employers should be aware that in order for a witness statement to be protected from disclosure in NLRB grievance proceedings it should declare that the employee adopts the statement as true and correct, and/or the witness must be given assurance that the signed statement itself will be kept confidential and not disclosed. Further, the attorney work-product privilege will not apply to workplace investigations undertaken in the absence of specific attorney advice as to the necessity of the investigation for anticipated litigation.

Topics

National Labor Relations Board (NLRB), Witness Statements